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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 158

BUDGET DRESS CORP.,

*Petitioner,*

*against*

JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK and its Constituent Locals, and CHARLES S. ZIMMERMAN, NATHANIEL M. MINKOFF and LEON NAMENWIRTH, individually and as General Manager, Secretary-Treasurer and President respectively, of the JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK; THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION AFL-CIO; and THE POPULAR PRICED DRESS MANUFACTURERS' GROUP, INC.,

*Respondents.*

**Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

FELLNER AND ROVINS,
*Attorneys for Petitioner,*
230 Park Avenue,
New York 17, New York.

LEONARD ROVINS,
MORRIS J. FELLNER,
ALAN D. GALLAY,
*of Counsel.*

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Respondents.

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

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**PETITIONER, BUDGET DRESS CORP., PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 9, 1962.**

## I.

## Opinions Below.

The opinion of the United States District Court for the Southern District of New York is reported at 198 F.

Supp. 4 (R54a-64a).* The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported at 299 F. 2d 936. (Appendix A, *infra* pp. 1a-2a).

## II.

### Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed is dated and was entered on March 9, 1962 (R218b-219b). The jurisdiction of this Court to review this case on certiorari is invoked under 28 U. S. Code, Section 1254 (1).

## III.

### The Questions Presented for Review.

Whether under Section 302 of the Labor Management Relations Act, as amended, (29 U. S. Code 141 et seq.), hereinafter called the Act, which prohibits a union from demanding or receiving any money from an employer, a union may lawfully demand and receive money from an employer allegedly but not concededly for a trust fund, the benefits of which the union admits do not inure to the employees based upon whose toil and wages the payments are demanded and received. This issue is one of first impression before this court.

Whether a union may lawfully demand and receive money from an employer based upon the toil and wages of the employees of such employer, under circumstances wherein the union consented that the employer work with

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* Numbers preceded by "R" refer to pages in record certified to the Clerk of the United States Supreme Court by the Clerk of the United States Circuit Court for the Second Circuit.

shops not under collective agreement with the union and whose employees are not members of the union, and allegedly turn these monies over to health and welfare funds of the union, in spite of the fact that the union knew that none of the employees of such employer at any time could benefit from such funds. This issue likewise is one of first impression before this court.

Whether under the circumstances of this case the granting of Summary Judgment prior to Petitioner's taking Respondent's depositions in support of the Complaint was premature and in violation of the due process of law to which Plaintiff was entitled.

## IV.

## The Statute and Rule Involved.

The statute involved is 29 U. S. Code, Section 141 et seq., 61 Stat. 136, known as the Labor Management Relations Act of 1947, and in particular Section 186, which provides, in pertinent part:

> "Sec. 186 (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer or such employees any money or other thing of value.
>
> (c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive bene-

fit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents).".

The statue involved was amended by the Labor Management Reporting and Disclosure Act of 1959 in respects not here germane. The above cited Section will be cited by its popular designation, Section 302.

The rule involved is Rule 56 (f) of the Federal Rules of Civil Procedure and reads as follows:

> "(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

## V.

## The Proceedings Below.

This case originated with the filing and service of a summons and complaint upon the Defendants (the designations of the parties in the District Court will be used throughout) on August 6, 1959. The Plaintiff is also at times referred to as the "Employer" and the Defendants either "Union" or "Association", as the case may be. The complaint seeks to recover monies wrongfully demanded and collected from Plaintiff by Defendants in violation of Section 302.

The Union acknowledged below that none of the employees upon whose toil and wages the payments demanded and

received were based could derive benefits from any health and welfare funds administered by the Union.

The complaint alleges two causes of action. The first cause alleges that Plaintiff is a manufacturer of dresses and was under collective agreement with the Defendant Union by reason of its membership in the Defendant Association; that Plaintiff resigned from the Defendant Association as of December 31, 1957 and was under no further obligation to the Defendant Union after expiration of the then existing collective agreement on January 31, 1958; that Defendants made demands upon and received monies from Plaintiff based upon earnings of workers; that no part of these monies were received by said workers, nor did any of said workers or their families or dependents derive any benefits from said monies, either directly or indirectly; that said workers were specifically excluded and ineligible to receive any benefits from any health, welfare and/or retirement funds and that said workers and their families could not derive any benefits from said monies; that, accordingly, the demand, receipt and acceptance of any such monies; were in violation of Section 302 of the Labor Management Relations Act; and that all such monies should be repaid to Plaintiff (R2a).

The second cause of action seeks injunctive relief based upon the unlawful demands of the Defendant Union (R2a).

Jurisdiction and the causes of action are predicated upon Sections 301 and 302 of the Labor Management Relations Act, 29 U. S. C. 185, 186.

The summons and complaint were served upon the Defendants on August 6, 1959. On August 26, 1959, exactly 20 days after service of the complaint, an answer accompanied by notice of depositions before trial and subpoenas with reference thereto, were simultaneously served upon Plaintiff. The manner in which the notice for depositions

and subpoenas were served together with the answer prevented Plaintiff from first serving notices for depositions. As a result, Plaintiff moved before the United States District Court for the Southern District of New York for leave to first examine the Defendants before trial, which motion was heard by Chief Judge Ryan, who ruled that prior service of the notices for depositions entitled Defendants to examine Plaintiff first. (Reported at 178 F. Supp. 699.)

After the examinations of Plaintiff by the Defendant Joint Board, was concluded and during the course of depositions before trial by the other Defendants, Defendant, Joint Board, moved by way of order to show cause in the same said District Court, to dismiss the complaint. The said order to show cause stayed Plaintiff from its attempted depositions of the Defendants until determination of the motion.

Plaintiff has throughout this litigation moved with diligence and was ready to take the depositions of Defendant immediately upon receiving the Defendant's answer below and would have so acted except for Defendant's filing its notice for depositions with its answer. Defendant's motion for summary judgment and to stay Plaintiff's taking the depositions was made to prevent Plaintiff from ascertaining facts which would aid Plaintiff in establishing its causes of action at trial.

The motion for summary judgment made by Defendant Joint Board was granted and was affirmed upon appeal to the United States Circuit Court for the Second Circuit. It is from this judgment that Plaintiff seeks the issuance of a writ of certiorari to the United States Court of Appeals For The Second Circuit.

## VI.

### Statement of the Case.

#### The Parties and their Relationship

Plaintiff is a manufacturer and designer of ladies' dresses which it sells to the retail trade. The cutting, sewing and trimming of garments is done by "contractors" with which Plaintiff deals from time to time.

Defendant Joint Board of Dress and Waistmakers' Union of Greater New York, is a Union composed of locals of Defendant International Ladies Garment Workers' Union, a national labor organization. The two above mentioned Unions will hereafter be referred to collectively as the "Union".

For more than 20 years and up to January 31, 1958, Plaintiff was a member of the Popular Priced Dress Manufacturers' Group, Inc., (hereinafter called "Association"), and as such was covered by the contracts between the Association and the Defendant Unions.

Each month during the term of the agreement Plaintiff, at the demand of the Defendant Union and upon the Defendant Union's forms, forwarded to the Defendant Union a list of contractors with which Budget had done work the previous month, showing the amount of work done in each contracting shop together with a check representing a percentage of the wages earned by the employees that previous month. Various monthly statements, copies of which are in the record (R43a, 53a) contained the names of both Union and non-union contractors with which Plaintiff had been working. Plaintiff had obtained consent from the Union to work with non-union contractors so

long as it paid the monies demanded by the Union with respect to the non-union contractors.

Defendant Unions agreed to Plaintiff's utilizing non-union contractors so long as Plaintiff capitulated to the demand for contributions based upon the wages of the employees in the non-union shops, in spite of the fact that the Union knew that the employees were not members of Defendant Union and who could and would not under the funds' rules and regulations share in the benefits resulting from the payments demanded and received from the Employer.

Certain basic facts in this action are admitted by Defendants and these admissions are summed up in the opinion of Judge Ryan below:

> "Although it appears that some or all of these monies in suit were paid into the funds computed on payments for work performed for Plaintiff by a Union contractor, Defendants in order to obviate any possible question of fact have stipulated that this Court may assume (for purposes of this motion only) that the sums paid were based upon payments made by Plaintiff to non-union contractors and not 'covered workers' and not employed by 'covered employers', and that consequently, they are not eligible to receive benefits from these funds." (R60a)

## VII.

### Reasons for Granting the Writ.

#### 1.

This case presents an important question of first impression relating to the language of Section 186 of the Act, set forth above at p. 3, and to its intended scope, which question should be settled by this Court.

Section 302 makes it unlawful for a Union to demand, receive or accept any money or other thing of value, except under certain specific and enumerated circumstances. The Defendant Union concedes that it and its representatives did demand, receive and accept money from Plaintiff. The demanding and receipt of this money from Plaintiff was unlawful unless it satisfies the exceptions to the broad prohibitions of Section 302 of the Act. The only pertinent exception here is Section 302(c)(5).

Section 302(c)(5) excepts payments by an employer to a trust fund from the broad prohibitions of Section 302 only under certain specified circumstances:

> "... with respect to money or other things of value to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents ...)".

The Defendant Union concedes the demands for the monies and concedes,

> "... that the sums paid were based upon payments to non-union contractors, that the workers in the shops of these contractors are not 'covered workers' and not employed by 'covered employers', and that consequently they are not eligible to receive benefits from these Funds."

The Union demanded the subject monies knowing that the employees would not and could not benefit from the funds and without any intention that they should benefit. These monies were not (using the statutory language)

"paid to a trust fund . . . for the sole and exclusive benefit of the employees of such employer . . ."

The issue in this case, i.e., whether under Section 302 a Union may lawfully demand and receive money from an employer the benefits of which do not inure to the employees, or any of them, based upon whose toil and wages the payments are demanded and received, is of great significance considering the power of unions, and specifically of the ILGWU and the Joint Board, to coerce such payments and considering also the latitude and privileges which unions in the apparel industry are given under the Act and other laws.

The demand and receipt of these monies is unlawful under the circumstances of this case. The unlawful act is not rendered lawful by the Unions' present contention that the money (part or all) is turned over to funds (of which the employees of the paying employer are not beneficiaries) rather than made other use of.

The statute in question was artfully drawn to insure that the employees derive benefits from the funds into which employers are required to make payments and to limit the type of payments which a Union can demand and which an employer may make. The payments demanded of plaintiff in this case do not fulfill the requirements of the statute and were unlawfully demanded and received.

The statutory language quoted above is an exception to a broad provision outlawing all payments to union representatives and as such is to be strictly construed.

The exception is specific; its language and intent clear and unmistakable; and it should be read without the deletion or addition of any words. It is a maxim of statutory interpretation that when the language of a statute or a part thereof is clear and unmistakable, no construction is needed

or allowed. (*Hamilton* v. *Rathbone*, 175 U. S. 414, 421, 20 S. Ct. 155, 44 L. Ed. 219). In *Caminetti* v. *U. S.* (242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442), this Court stated:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."

Chief Justice Marshall wrote to the same effect:

> "Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application." *Sturges* v. *Crowninshield* (4 Wheat 122, 202, 4 L. Ed. 529, 550).

The practice here complained of is not isolated to this Plaintiff and the Unions. In fact this is a frequent practice by these Unions in the garment industry. The law should be defined and the illegal practice stopped.

In the instant case, the statute in question clearly exempts only payments made by employers to funds whose benefits are to be for the employees of "such employer". This is as it should be. The demand for monies with respect to

employees who are excluded is in violation of the Act. The Union conceded that the employees for whom payments were made were and are precluded from the benefits under any funds. The Union by demanding and receiving monies, knowing that the employees for whom payments are made are excluded, violated the Act.

Although the plain meaning is clear and unmistakable and construction is therefore not warranted, the plain meaning of Section 302 (c) (5) of the Act is amply supported by the reports and statements made during the Congressional debates which culminated in the passage of the 1947 Amendment of the Act.

The majority report on the Senate Bill which substituted the language of 302 (c) for proposed language which would have outlawed all trust funds states:

> "Without such restraints, employees would have no more rights in the funds supposedly established for their benefit than their union leaders choose to allow them." (Senate Report No. 105 on S. 1126).

The minority report concurred as follows:

> "In considering S. 1126, the committee properly eliminated sections prohibiting any payment by any employer to any representative of his employees . . ., except under narrowly restricted circumstances. One of the prineipal exceptions was permissible payment to a trust fund soleiy for the benefit of the employer's own employees . . ." (Senate Minority Report No. 105 on S. 1126; see also Congressional Record, Senate, April 25, 1947, 4157).

Senator Ball, in support of the language of Section 302 (c) (5) made clear that the exception to the prohibition meant just what it said, as follows:

> "Mr. President, the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . ." (Cong. Record, Senate, May 7, 1947, 4805);

and further:

> "Again, all we are doing is protecting the rights of the employees whose toil creates these welfare funds.", (Cong. Record, Senate, May 13, 1947, A2378).

The language, intent and purpose of Congress in enacting Section 302 (c) (5) is clear. The language, intent and purpose was to limit the demand and collection of monies to funds established for the sole and exclusive benefit of the employees of such paying employers.

This is a matter of first impression at this level. The Court should be guided by the intent of Congress manifest by the language used and the statements made in support thereof and should find the demands and receipts admitted by the Defendants to be in violation of the Act.

The Defendant Union conceded that the employees for whom Plaintiff had to pay a proportion of their wages to the Union could not benefit from the payments in question. The Union has conceded that (60a):

> (1) The employees were not covered workers;
>
> (2) That employees were not employed by covered employers; and
>
> (3) The employees for whom the payments were made were not eligible to receive benefits from the funds.

Thus, even with respect to the money allegedly paid to the trust funds, the funds were not "for the sole and exclusive benefit of the employees of such employer and their families and dependents" and do not qualify under Section (302) (c) (5).

In phrasing the exception the Congress could have excluded "such employers" and could have had the section read "for the sole and exclusive benefit of employees, and their families . . ."—but the Congress did not delete these words. Congress intended what they said in clear and unmistakable language.

The statute expressly deals with monies for the benefit of the employees of the paying employer, not employees generally, and this is so even with regard to "pooled" funds by saying "or of such employees . . . together with the employees of other employers making similar payments."

The opinion of the District Court that "so long as the funds are used for the benefit of the employees (in the dress industry) and not diverted to other uses, the statutory immunity applies to these payments . . ." (R67a) is in error and in complete disregard of the language of the statute. The rules and regulations of the funds specifically exclude employees, such as those of the Plaintiff from the benefits of the funds, and the Union knew this at the time it demanded and received such monies. The payments must be for funds which meet the requirements of Section 302 (c) (5) and this does not mean for employees generally.

It is beside the issue to contend that the funds are pooled funds to which payments are not made for the benefit of any particular worker. The funds into which money is paid, pooled or otherwise, must still be for the "sole and exclusive benefit of the employees of such employer . . . (or of such employees . . . jointly with the

employees of other employers making similar payments ...);..."

The Courts are not free, under the guise of construction, to amend a statute by inserting or striking words from a statute or in any way rewriting it (*Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, 72 S. Ct. 223, 96 L. Ed. 148). This is what the District Court did by failing to give meaning to the words "employees of such employer" in Section 302 (c) (5) of the Act. There is no basis in the Act for the exclusion of a group of employees from the protection of the Act, as was done here, whereas there is a specific requirement that they reap benefits from the funds, or else the demand and receipt of payments are illegal.

There are cases in which it has been held that payments must be made into welfare funds on the basis of the wages of non-union as well as unionized employees (*Klein* v. *Cross*, App. Dept., Superior Court, Los Angeles, Civ. A. No. 9383, Dec. 19, 1947, 41 LRRM 2325). The union, however, in that case and in the others in point, was the bargaining agent for the employees, whether union members or not, and both union and non-union employees were beneficiaries of the Funds. In the instant case the Union was not the bargaining agent for the employees of the non-union contractors, it never has claimed to be, and it cannot be until and unless it has shown majority status. The latter element is the cardinal element of our National Labor policy. Also, in the case at bar, the non-union employees concededly are not eligible for benefits under the plan.

The case of *In Re Larry Jay, Inc.* (3 App. Div. 2d 386, 160 N. Y. Supp. 2nd 790), holds that employees of a contractor given work by a jobber who is subject to the terms of a collective bargaining agreement are, for the purposes of the protection of the employees covered by the agree-

ment, i.e., employees of the jobber. Thus, in *Larry Jay*, the wages of the non-union contractor(s) are protected, whereas in the instant case the Union's position, in substance, is to cast to the winds the rights and interests of such employees. This, it would do, cynically, it might be added, in view of long time, arduous and successful efforts by the Union to have the jobbers and the contractors in the garment industry considered as inseparably allied and as the same employers. As a matter of legislative intent, convincing evidence exists that Congress, prior to the 1959 Taft-Hartley amendments, intended that the law apply this way in the garment industry. The exception is now set forth in Section 8 (e) of the Act makes the intention explicit and definite.

The Union, having been charged with a patent violation of Section 302 (c) (5) of the Act, ingenuously and capriciously came up with the excuse of the measuring rod concept which is belied in the very Rules and Regulations dictated by the Union itself.

Thus, we return to the basic limitation of Section 302 (c) (5):

> "for the sole and exclusive benefit of the employees of such employer."

Even if the germane provisions of the contract and the rules of the funds sought to penalize jobbers for letting out work to non-union contractors, the statute as written prohibits the type of payments made herein and Congress alone can change the wording of the statute (*Pillsbury* v. *United Engineering Co., supra*).

If, as the Court below found, the funds were generally for employees in the dress industry, why were these subject employees, who obviously are in the dress industry and for whom payments obviously were made, excluded as beneficiaries?

*Reductio ad absurdum* if the employees of the non-ILGWU shops chose another union which provided health, welfare and pension benefits upon payment by the jobber or contractor, the Court below would still require payments under the Funds to the Union thereby requiring the employer to pay twice. This would be true even if, as here, the Union condoned the use of non-designated shops.

This is a case of first impression before this honorable Court. The few decisions of lower courts cited below are distinguishable upon their facts and under any circumstances did not apply the statute as intended and as written.

*Greenstein* v. *National Skirt & Sportswear Association* case, 178 F. Supp, 681, 274 F. 2d 430 (CA 2), cited by Judge Ryan, is not pertinent to the issues in this matter. The facts therein are significantly different. It must be noted that in Greenstein the monies claimed by the union were liquidated damages and not monies due to be paid to the funds based upon the weekly wages of employees who were not eligible for benefits. In the case at bar the use of non-union contractors was with the knowledge and consent of the union, and no taint is possible by reason of this acquiescence. No concession was made by the union in the Greenstein case, such as here, that none of the employees of the employer were beneficiaries.

*Minkoff* v. *Scranton Frocks*, 181 F. Supp. 542, 279 F. 2d 115 (CA 2), likewise is not in point. The union there contended that the workers who were expelled from union membership in that case, were nevertheless covered employees and the employer a covered employer and that therefore the employees were eligible for benefits. There is a very significant distinction wherein individual employees of a covered employer are denied benefits, although the union contends that the employer's employees generally were so entitled, compared with the instant case wherein the union

concedes that neither the employer nor the employees are covered, hence, the very demand and payments were unlawful. In the *Scranton* case the denial of benefits was a matter to be settled between the worker and the fund. Where, as here, the very demands were for monies which were not for the sole and exclusive benefit of the employees of the paying employer, which the union concedes, there is a violation of the statute and there is a basis for Plaintiff's recovery of the monies unlawfully collected.

It is submitted that *Kriendler* v. *Clarisse Sportswear Co.*, 184 F. Supp. 182, is in error. The Court therein countenanced "members only" funds, contrary to National Labor Relations Board and court cases (see *NLRB* v. *Local 138 Operating Engineers*, 293 F. 2d 187) and would rewrite the statute to allow exceptions to the broad provisions prohibiting payments where no such exceptions were provided by the Congress. The Court in *Kriendler* also errs in its reasoning that if the employer's contention therein is correct, i.e., that the funds to which payments were made were not for the sole and exclusive benefit of his employees and hence for the payments to be lawful all should be covered, then an employer whose employees are engaged in two crafts and who were members of two different unions could not lawfully contribute to the funds of either because neither fund would be for the benefit of all employees. The test in such a case would be whether the employees for whom monies were paid into the particular fund could benefit from that fund.

The Act is not concerned with the technical aspects of determining and administering the payment benefits under the plans as defined by Section 302. In the instant matter the Court below failed to see that it is not the technical matter of administering the payments made by the funds that is in issue, but rather the requirement of the Union

that it not demand monies from employers for funds or otherwise, which under no stretch of the imagination could be for the sole and exclusive benefit of the employees of such employer. Failing to be for "the sole and exclusive benefit of the employees of such employer . . . (or of such employees, . . . jointly with the employees of other employers making similar payments, . . .)", the demand for such payments and their collection is a violation of Section 302.

The union argued below that the employees in the manufacturing shops are not employees of Plaintiff. If they are not Plaintiff's employees, what basis have the unions for demanding payment from Plaintiff based upon their wages and toils?

Plaintiff does not contend that those employees of Budget, or of a contractor of Budget, who had nothing to do with the production of the dresses involved and on whose behalf no payments were made, are entitled to benefits under the Funds. Thus, an office clerical would not ipso facto be entitled to benefits under the Funds. Plaintiff does contend, and it is supported by legislative history of the statute and by the words of the statute itself, which are the primary sources for statutory construction, that employees for whom payments are made and on whose toil the payments are figured and paid are entitled to benefits from the Funds. If they are excluded, as they are in the instant situation, the payments received by the Union based upon their efforts and paid on their behalf, but from which they cannot benefit, are illegally demanded and received. Likewise, if some of Budget's employees were covered by a different union and no payments were made to the instant Funds on their behalf, there would be no claim, nor could there be if these employees should be beneficiaries of the Funds.

All employees in a class, group or classification are entitled to the same benefits. In view of the peculiar relationship between jobbers and contractors, the employees of the contractors stand in the relationship of employees of Plaintiff as was contemplated by Section 302(c)(5). Since the monies demanded and received were based upon the earnings of those employees, they were entitled to benefits.

For Appellees to contend, as they do, that it can select beneficiaries from within the classes of employees for whom payments were made, is for them to distort the entire purpose of Congress. It was, *inter alia*, the power to choose and the corollary power to omit certain employees from benefits, that Congress was concerned with, when it passed the subject legislation. The obvious intent, as manifest by the statements made in support of the provisions of Section 302(c)(5), was that all employees benefit from these payments and not just as the Union saw fit.

The Union's blatant disregard for employees is clearly shown by the language it used on Page 22 of its brief below:

> "It (the statute) does not require that they (benefits) be paid to all classes. Here, it is plain that the categories of the beneficiaries selected were within the permissible classes".

The complaint states a good cause of action to recover monies unlawfully demanded, received and accepted by the Union and its representatives in violation of the Act.

The District Court labelled Section 302(a)(b)(c) as an anti-bribery statute at the very outset of its opinion (54a) and added a footnote to the effect that Congress was concerned primarily with the corruption involved in collective bargaining. The Court also emphasized that because, in the Court's opinion, none of the officials of the Union pocketed

any of the monies demanded and received there could be no violation of the statute. This label and this interpretation of the Act is wrong. The statute was enacted by Congress with the expressed view to protect the employees upon whose toil the payments were made. Congress enacted this statute to prevent any unlawful conduct on the part of the defendant union or its representatives, irrespective of whether the monies demanded and received were put into the pockets of Union officials, funds or elsewhere. Congress qualified the type of funds which would suffice.

The Act was never intended solely as an anti-bribery statute. As Senator Ball stated in support of this Section.

> "Mr. President, the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . ." (Cong. Record, Senate, May 7, 1947, 4805).

and further:

> "Again all we are doing is protecting the rights of the employees whose toil creates these welfare funds" (Cong. Record, Senate, May 13, 1947, A2378).

If the interpretation of Judge Ryan were accepted, then any person demanding money, no matter how unlawful and illegal could circumvent the statute by delivery of the money to a fund in no way related to the employer or the employees in question.

The true disposition made of the money demanded and received by the Union remains to be established during the course of depositions of the Defendants and upon trial. The Defendants have made every effort to prevent these

depositions. Obviously, the defendants are withholding this information from the Plaintiff and the courts.

The anti-bribery label imposed by Judge Ryan upon this Section, was never intended by Congress. It in fact adds language to a statute which Congress was careful to avoid, namely, a limitation of the unlawful acts involved in the improper demanding of monies. The Record on this appeal established that the defendants knowingly demanded and received monies from an employer based upon the toil of employees who would derive no benefits from such monies. The record on this appeal establishes that the Union knew that the purpose of these payments was labor peace, i.e., no strikes, picketing, work stoppages and the free flow of goods (48a). These are the very acts which Congress sought to outlaw by prohibiting payments to defendants or to Union representatives.

The statute is far broader than a mere anti-bribery statute. There are other federal penal laws which make bribery unlawful and it was not necessary for Congress to enact Section 302 to outlaw bribery as such. The purpose of Section 302 was to protect the employees upon whose toil the payments were made, without limitation. The Court below erred in its interpretation and understanding of the statute.

The petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

2.

Within twenty (20) days after service of the Summons and Complaint and simultaneously with service of the Answer, Defendants served its notice to take depositions of the Plaintiff together with subpoenas. Plaintiff then moved to vacate the said notice and subpoenas on the ground that

orderly procedure dictated that the Plaintiff first conduct its examination as much of the facts in support of the Complaint were within the knowledged and control of the defendants. This motion was denied on the ground that defendants earlier service of the notice entitled it to the first right to take depositions (R498-531).

After the defendant, Joint Board completed its depositions, but before Plaintiff could commence taking depositions, the motion for summary judgment was made by defendant, Joint Board, accompanied by a stay of all depositions. The obvious purposes were to deprive Plaintiff of its opportunity to examine defendants and to withhold the information which would have supported the Complaint (R11(a), 12(a)).

The circumstances in the case at bar meet the intended purposes of Rule 56(f) and the consideration of the defendants motion for summary judgment was premature and in contravention to the provisions of Rule 56(f). This Rule has been consistently followed by the Courts in cases of this kind and the motions for summary judgment have either been deferred pending completion of depositions by the party opposed thereto or have been denied. Succinctly put was this precept in *Hummel* v. *Riorden* (N. D. Ill., 56 F. Supp. 983) where the Court said per LaBuy, D. J.:

> "Under Federal Rules of Civil Procedure, Rule 56(f) 28 USCA following section 723c, with reference to the entry of summary judgment, it is provided that: 'Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to

be taken or discovery to be had or may make such other order as is just.' The Court is of the opinion that under the circumstances in the present case and under the facts stated that the above rule should be applied herein and the application for judgment refused."

The funds are within the control and supervision of the defendants. The defendants alone knew which employees had been granted benefits and which employees had been rejected as not being "covered employees". The defendants alone knew the workings of the funds. The defendants knew that employees who were not members of the Union and who were not represented by the Union were not "covered employees". Defendants knew that such employees had not been allowed any benefits at any time and that neither families nor dependents of such employees would ever receive any benefits from the funds. However, the specific instances of denial of such benefits and the specific workings of the funds were within the exclusive knowledge and control of the defendants. This information is essential to the matter at hand and depositions should have been allowed to proceed.

Rule 56(f) of the Federal Rules of Civil Procedure is intended to prevent this very unjust and inequitable condition which the Union is attempting to create. Rule 56(f) reads as follows:

"(f) WHEN AFFIDAVITS ARE AVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Moore's Federal Practice, Vol. 6, p. 2345, comments on Rule 56(f) as follows:

> "A typical situation for the application of Rule 56(f) is where the opposing party cannot then present by affidavit facts essential to justify his opposition, because knowledge of these facts is exclusively with or largely under the control of the moving party."

In *Whitaker* v. *Coleman* (CCA 5th, 115 F. 2d 305), the Court said upon appeal from the granting of a motion for summary judgment, through Hutcheson, C. J.:

> ". . . Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. Rule 56 is carefully drawn to effectuate this purpose. Subdivisions (a) and (b) provide for the institution of the procedure. Subdivisions (c) and (d), the one for complete, the other for partial determination of the existence of genuine issues as to material facts, Subdivision (e) provides for affidavit and other forms of proof while Subdivision (f), making it further clear that the judgment is to be rendered only where it clearly appears that there is no issues, provides for the granting of a continuance to obtain proofs which appear to be existent but not then available. It is quite clear that technical rulings have no place in this procedure and particularly that exclusionary rules will not be applied to strike, on grounds of formal defects in the proffer, evidence proffered on tendered issues. While therefore, it

> does not appear from the record that the transcript of Jones' testimony was in any manner defective or why its offer was refused, this certainly apprised the judge that there was relevant and important evidence which defendant-appellant could and would tender on the trial and notwithstanding this, he was refused a continuance to get the evidence and the matter was pressed at once and erroneouly to summary judgment."

In the case at bar, it is submitted that the Defendants sought to use the summary judgment procedure to trap plaintiff in its toils and deprive it of a trial, precisely the thing condemned by the opinion in the *Whitaker* case (*supra*).

Defendants, as the moving party for summary judgment, have the burden of proof to establish the absence of a genuine issue of fact. This the Defendants have failed to do. The concession that the employees were not covered employees and that the employer was not a covered employer and that the employees did not benefit from any Fund, does not satisfy the issues of fact raised by the pleadings. There are substantial facts which remain to be determined during the course of depositions and at trial. The fact that Defendants demanded and received monies *knowing* that such monies would not and could not be used for the sole and exclusive benefit of such employees and the fact that these monies were never intended for health and welfare benefits for the employees, are among the facts and issues to be determined as a result of depositions and trial.

With regard to the issues still extant, Plaintiff has but limited access to the facts which are within the sole and complete knowledge of the Defendants and which would have been developed by depositions. It is incumbent upon

the moving party to establish that there are no genuine issues of material fact extant. This Defendants have not done and it was error for the Court below to have granted summary judgment.

The rule as to burden of proof is best stated in Moore's Federal Practice. We cite from Moore's and respectfully recommend this Court to the wealth of cases which are in the footnotes in support of this Rule (Vol. 6, Par. 56.15 (3), page 2123):

> "The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. And the papers supporting movant's position are closely scrutinized, while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden."

Issues of fact remain. They can only be ascertained by way of depositions before trial. Defendant's motion was premature and it should have been denied.

In summary judgment, the moving party is entitled to judgment as a matter of law only when it is clear as to where the truth is and where no genuine issue remains

for trial (*Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620). In the *Sartor* case, this Court wrote as follows:

> "It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner."

In the Second Circuit, the Circuit Court of Appeals has cautioned against summary judgment. It held that a plaintiff should not be deprived of its right to cross-examination and trial on affidavits. In *Colby* v. *Klune* (178 F. 2d 872), Judge Frank wrote:

> "We have in this case one more regrettable instance of an effort to save time by an improper reversion to 'trial by affidavit', improper because there is involved an issue of fact, turning on credibility. Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses' demeanor; and that demeanor—absent, of course, when trial is by affidavit or deposition—is recognized as an important clue to witness' credibility. When, then, as here, the ascertainment (as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error. It did not cure the error that each side moved for such a judgment in its favor."

In the case at bar, Plaintiff did not have an opportunity to examine the Union before trial concerning matters within their exclusive control. Without such information the Dis-

trict Court could not pass upon the propriety of the motion for summary judgment since it did not have available the facts which Plaintiff would have elicited by deposition. The Union offered tomelike affidavits containing much of the transcript of the deposition of Plaintiff's witnesses. Plaintiff, by reason of the stay, did not have the opportunity to submit affidavits based upon testimony of the Unions by which to establish not only its case but the existence of material facts in issue in opposition to the motion for summary judgment.

The Union sought determination upon affidavits based upon depositions of Plaintiff's witnesses and have stayed the commencement of depositions of their own witnesses. By so doing they have continued in obscurity the evidentiary matter which will support the allegations of the complaint. Under these circumstances it cannot be said that the moving Defendants even approached sustaining the burden required of them before their motion can be granted.

The Court below erred in granting the motion in light of Defendants' obvious failure to demonstrate the absence of any genuine issue of material fact.

We respectfully submit to this Court that the granting of Defendant Unions' motion for summary judgment was premature and was in violation of due process of law.

## VIII.

Petitioner, plaintiff below, respectfully submits that the confusion created by the decision of the United States District Court for the Southern District of New York and by its affirmance in the Circuit Court is unwarranted where the statute here is clear and unambiguous and where the legislative history is in support of the clear and unambiguous language of the statute.

Petitioner therefore respectfully prays that the Court exercise its supervisory jurisdiction to resolve the substantial question raised by the issues herein and by the decision below and that this petition for a writ of certiorari be granted.

Respectfully submitted,

FELLNER AND ROVINS, Esqs.,
Attorneys for Petitioner

June 5, 1962

LEONARD ROVINS,
MORRIS J. FELLNER,
ALAN D. GALLAY,
of Counsel.

## Appendix A.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

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No. 217—September Term, 1961.

(Argued February 23, 1962 Decided March 9, 1962.)

Docket No. 27221.

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BUDGET DRESS CORP.,

Plaintiff-Appellant,

*against*

JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK AND ITS CONSTITUENT LOCALS, and CHARLES S. ZIMMERMAN, NATHANIEL M. MINKOFF and LEON NAMENWIRTH, individually and as GENERAL MANAGER, SECRETARY-TREASURER and PRESIDENT, respectively, of the JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK; THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; and THE POPULAR PRICED DRESS MANUFACTURERS' GROUP, INC.

Defendants-Appellees.

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Before:

MOORE, FRIENDLY and MARSHALL,
Circuit Judges.

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Appeal from summary judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, Chief Judge. Plaintiff appeals from

an order dismissing its action to recover monies allegedly paid in violation of the Labor-Management Relations Act.

Affirmed.

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MORRIS J. FELLNER, New York, N. Y. (Fellner & Rovins, on brief), for Appellant.

EMIL SCHLESINGER, New York, N. Y. (Schlesinger & Bloom, on brief), for Appellees Joint Board, *et al.* (Morris P. Glushien, on brief), for Appellee ILGWU (Phillips, Nizer, Benjamin, Krim & Ballon, on brief), for Appellee, Popular Association.

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PER CURIAM:

Appellant seeks to recover monies paid into certain health, welfare and retirement funds on the grounds the payments violated section 302 of the Labor-Management Relations Act, 29 U. S. C. A. §186. On the basis of *Minkoff v. Scranton Frocks, Inc.*, 181 F. Supp. 542, *aff'd per curiam* 279 F. 2d 115 (2 Cir. 1960) and the opinion of Chief Judge Ryan in the present case insofar as it deals with the merits of appellant's claim under Section 302, we affirm.